No. 83-1560

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1983

STATE OF KANSAS,
Respondent,

vs.

JOSEPH WILLIAM CANTRELL,
Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION

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8 pp

QUESTIONS PRESENTED

(1) Whether the Kansas statute defining rape is unconstitutional for vagueness.

(2) Whether the judicial determination that the crime of rape is not a specific intent crime is a prohibited *ex post facto* law prohibited by Article 1, Section 10 of the United States Constitution.

(3) Whether a sentence of five to twenty years for a jury conviction for the crime of rape is prohibited as cruel and unusual punishment proscribed by the Eighth Amendment of the United States Constitution.

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The opinion of the Supreme Court of the State of Kansas (App. A of Petition) is reported at 234 Kan. 426, ... P.2d ..... (1983).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition (pp. 2-4).

STATEMENT

Petitioner, Joseph William Cantrell, was charged and convicted of the crime of rape under Kansas law.

The only contested issue at the time of the jury trial was whether the victim consented to the intercourse. The trial evidence established the victim told him to stop and was crying. The victim testified she did not consent to the intercourse. A jury found the petitioner guilty.

The jury conviction and sentence of 5 to 20 years was appealed to the Kansas Supreme Court which affirmed the trial court conviction and sentence.

ARGUMENT

Questions one and two presented by petitioner contend that the Kansas Supreme Court by judicial construction eliminated the criminal intent requirement for rape and this judicial construction had an *ex post facto* effect regarding rape in the State of Kansas. The effect of the judicial construction has a very profound impact on both of these questions and will be dealt with separately.

1. The Kansas rape statute, Kansas Statutes Annotated [1969] §21-3502, provides in relevant part:

> [1.] Rape is the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances:
>
> [a.] When a woman's resistance is overcome by force or fear.

There is no statutory specific intent requirement contained within this statute, and an intent to rape is clearly

not a statutory element of the crime. The only intent requirement under Kansas law and as instructed in the trial court's instructions to the jury is set forth in Kansas Statutes Annotated 21-3201 the relevant portions which are set forth in the petition at page 3. This statute requires the prosecution to establish a general criminal intent.

The Kansas Supreme Court in deciding petitioner's case stated: "Thus it appears that on occasion the court has indicated that rape is a specific intent crime." Notwithstanding this statement, the question whether a specific intent is an element of rape has not been decided in Kansas until petitioner's case.

Arguing that rape is a specific intent crime, Petitioner relies upon *State v. Hampton,* 215 Kan. 907, 525 P.2d 127 (1974) and *State v. Gonzales,* 217 Kan. 159, 535 P.2d 988 (1975). The issue in both of these cases is not whether rape is a specific intent crime or a general intent crime. The issue was whether evidence regarding other crimes was admissible under Kansas Statutes Annotated 60-455[1] to establish intent and plan of operation (*Hampton*) *supra* and intent, motive, and plan of operation (*Gonzales*) *supra.* The Kansas Supreme Court clearly stated in *Hampton* that "Intent and plan of operation are highly significant, they are relevant to the issue of consent or lack thereof." The state court determination that certain evidence is admissible in a criminal trial does not create or enlarge a criminal statute to include an intent requirement not contained in the original statute.

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1. 60-455 OTHER CRIMES OR CIVIL WRONGS. Subject to K.S.A. 60-477 evidence that a person committed a crime or civil wrong on a specified occasion, is admissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-455 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent or absence of mistake or accident.

The effect of these prior court rulings was that evidence of the defendant's intent is relevant to the proof of lack of consent. This rule does not establish "intent to rape" as an element of the offense of rape as petitioner contends.

One other Kansas case requires discussion on the *ex post facto* issue. In *State v. Carr,* 230 Kan. 322, 634 P.2d 1104 (1981), the defendant was charged and convicted of aggravated burglary and attempted rape. The court held that intent to commit rape was a necessary element of the attempted rape charge. This conclusion was clearly based upon the Kansas attempt statute, Kansas Statutes Annotated 21-3301, which provides in relevant part:

> An attempt is any overt act toward the perpetration of a crime done by a person who *intends to commit such crime* but fails in the perpetration thereof or is prevented or intercepted in executing such crime. (emphasis added)

The specific intent to commit the crime of rape discussed in *Carr* is an element of the crime of the attempt charge and not an element of the rape charge.

The Kansas rape statute does not require proof of any specific intent as an element of the offense. There is no authority that proof of specific intent has been required as an element of proof of rape.

Petitioner's *ex post facto* argument is based upon the erroneous assumption that the status of the law prior to petitioner's case required proof of a specific intent to commit rape. This was not an accurate appraisal of the law and thus petitioner's argument must fail.

There remains then the question in petitioner's first question whether the Kansas rape statute is unconstitutional for vagueness. The Kansas Supreme Court discussed

the test to be applied to statutes in *State v. Huffman*, 228 Kan. 186. The court applied the correct test[2] to the rape statute and concluded the statute to be constitutional.

2. Petitioner's contention there was judicial elimination of specific criminal intent has been discussed above and is without merit.

3. Upon petitioner's conviction for the crime of rape, he was sentenced for a term of 5 to twenty years. Petitioner has provided no authority for the proposition that a sentence of 5 to 20 years is violative of the Eighth Amendment prohibition against cruel and unusual punishment. To the contrary, the sentence imposed is extremely reasonable given the nature of the offense.

CONCLUSION

The issues presented by the petitioner for the reason that petitioner has failed to factually establish an *ex post facto* act, that the rape statute is not vague nor are the applicable penalties cruel and unusual. The opinion of the Kansas Supreme Court below is clearly correct.

Respectfully submitted,

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2. For the test used see Appendix A of the Petition, pp. A15.